FILED
APR 1 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

—against—

IPPOLITO-LUTZ, INC.,

Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

ALBERT FOREMAN
of Counsel for
M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Respondent
747 Third Avenue
New York, New York 10017
212-759-1720

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Petitioner has made a number of statements in its Reply Brief which are completely at odds with the Record in this case and cannot be allowed to go unanswered.

On page 2 of its Reply Brief, Petitioner contends that the stipulation entered into between Petitioner and Respondent (expunging from the Record certain affidavits which were not properly part of the Record) did not constitute a stipulation that these papers were "improper." This is simply not so. The stipulation was entered into only after Respondent had moved to dismiss Petitioner's appeal in the Appellate Division because Petitioner had placed in the printed record those very four affidavits, none of which had been before the Court when the motion being appealed from was decided. These affidavits had never been served

upon Respondent and of course, Respondent never even had an opportunity to respond thereto. A copy of this stipulation appears as Appendix "A" of this brief.

Petitioner further states in its Reply Brief that when these same affidavits were included in the records before the Appellate Division, Third Department (on motion to reargue), and before the Court of Appeals of the State of New York on Petitioner's motion for leave to appeal, that "no attempt was made to have these papers deleted." This is also not true. There was no motion procedure available by which objection *could* be taken; the only avenue of protest was by way of answering affidavits on each of the aforementioned motions.

Objection *was* taken in the affidavits submitted in opposition in each instance and, in each case, a letter sent to the Clerk of the Court reiterating Respondent's protests. Copies of those letters are annexed hereto as Appendix "B" and "C."

On page 3 of its Reply Brief, Petitioner appears to be arguing that the record before the New York Courts was in some way defective because the original Notice for Discovery and Inspection was not included. The Notice was not a part of the record for the simple reason that it had been part of the record on Respondent's earlier motion for an order compelling Petitioner to comply, at which time the propriety and scope of the Notice had been litigated and a decision rendered by Special Term that the Notice was entirely proper, that the items sought by the Notice were material and necessary to the prosecution of the action, and directing Petitioner to comply immediately therewith. The later motion (which resulted in the striking of Petitioner's

answer) was to punish for failure to comply with this prior order of the Court. The Notice was no longer in question, and was not properly a part of the record. The only issue at that point was Petitioner's blatant refusal to obey the prior order of the Court directing it to comply with the Notice.

Petitioner also appears to be arguing (on page 3 of the Reply Brief) that the stipulation entered into between the parties expunging the affidavits which had improperly been included in the Record by Petitioner was made pursuant to New York State Procedures which permit parties to stipulate to an appendix method of appeal and include only those parts of the record which they deem germane to the appeal. The stipulation in question was not entered into in accordance with any such procedure. It was executed because, in the midst of a motion to dismiss its appeal, Petitioner conceded that it had improperly included in its purported record affidavits which had not been before the Court at Special Term when it reached its decision to strike the answer and which had never been served upon Respondent.

Guarnacci v. *Ferguson,* 29 A.D.2d 839 (4th Dept., 1968) is no authority whatever for Petitioner's contention. In *Guarnacci* the Court simply held that an appeal could not be prosecuted upon a patently insufficient record, from which pertinent portions of the testimony had been omitted by stipulation. The appeal was stricken from the calendar and the appellant directed to file a supplementary record. *Guarnacci* in no way supports Petitioner's apparent contention that affidavits which were *not* a part of the papers before the Court at Special Term when it decided a motion can, under any circumstances, be made a part of the record on an appeal from the decision on that motion.

Lastly, Petitioner points out that Respondent, too, has referred to matters outside the record and that this, somehow, legitimizes Petitioner's own excursions. Indeed, it is hard to see how Petitioner's misstatements and misrepresentations of the record could have been discussed otherwise. We regret the necessity of so doing; Petitioner's own conduct left us no choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT FOREMAN
of Counsel for
M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Respondent
747 Third Avenue
New York, New York 10017
212-759-1720